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In the United States
Circuit Court of Appeals
For the Ninth Circuit.

1014

THE REPUBLIC SUPPLY COMPANY OF CALIFORNIA, a corporation,

Complainant,

vs.

RICHFIELD OIL COMPANY OF CALIFORNIA, a corporation,

Defendant.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, as Trustee, GEORGE ARMSBY, F. S. BAER, HARRY J. BAUER, STANTON GRIFFIS, ROBERT E. HUNTER and ALBERT E. VAN COURT, known and designated as Richfield Bondholders' Committee,

Appellants and Cross-Appellees,

vs.

UNIVERSAL CONSOLIDATED OIL COMPANY, a California corporation,

Intervenor, Appellee and Cross-Appellant,

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, BANK OF AMERICA, a corporation, PAN AMERICAN PETROLEUM COMPANY, a corporation, WILLIAM C. McDUFFIE, as

(Continued on Inside Cover.)

Reply of David R. Faries, as Amicus Curiae in Behalf of Universal Consolidated Oil Company, to Petitions for Rehearing of Appellants and Cross-Appellees Security-First National Bank of Los Angeles, as Trustee, et al., and William C. McDuffie, as Receiver of Richfield Oil Company of California.

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Receiver for Pan American Petroleum Company, a corporation, **RICHFIELD OIL COMPANY OF CALIFORNIA**, a corporation, **UNITED STATES OF AMERICA, THE REPUBLIC SUPPLY COMPANY OF CALIFORNIA**, a corporation, **CITIES SERVICE COMPANY**, a corporation, **ROBERT C. ADAMS, THOMAS B. EASTLAND, EDWARD F. HAYES**, and **RICHARD W. MILLAR**, known and designated as Pan American Bondholders' Committee, **G. PARKER TOMS, ROBERT C. ADAMS, F. S. BAER, ROBERT E. HUNTER, HENRY S. McKEE** and **RICHARD W. MILLAR**, known and designated as Richfield Pan American Reorganization Committee, **WILLIAM C. McDUFFIE**, as Receiver of Richfield Oil Company of California, **SECURITY-FIRST NATIONAL BANK OF LOS ANGELES**, a national banking association, **PACIFIC AMERICAN COMPANY**, a corporation, **AMERICAN COMPANY**, a corporation, **MANUFACTURERS TRUST COMPANY OF NEW YORK**, a corporation, **CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES**, a national banking association, **FIRST NATIONAL BANK AND TRUST COMPANY OF SEATTLE**, a national banking association, **CONTINENTAL ILLINOIS BANK AND TRUST COMPANY**, a corporation, **THE FIRST NATIONAL BANK OF CHICAGO**, a national banking association, **CHEMICAL NATIONAL BANK AND TRUST COMPANY**, a national banking association, and **CALIFORNIA BANK**, a corporation, **M. W. LOWERY, HENRY S. McKEE, O. C. FIELD, R. R. TEMPLETON**, known and designated as Richfield Unsecured Creditors' Committee,

Appellees.

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Reply of David R. Faries, as Amicus Curiae in Behalf of Universal Consolidated Oil Company, to Petitions for Rehearing of Appellants and Cross-Appellees Security-First National Bank of Los Angeles, as Trustee, et al., and William C. McDuffie, as Receiver of Richfield Oil Company of California.

Introduction

To the Honorable United States Circuit Court of Appeals for the Ninth Circuit and the Judges thereof:

This reply is filed by David R. Faries, counsel for minority stockholders of Universal Consolidated Oil Compan, as *amicus curiae* in behalf of that company pursuant to telegraphic request on October 9th for leave so to do and the answer of the Clerk of this Honorable Court suggesting that this reply be presented within ten days from that date. When this request was made the undersigned counsel had received a copy of the petition for rehearing of the appellants and cross-appellees, Security-First National Bank of Los Angeles, et al., (hereinafter referred to as Security Bank). Thereafter, we received a copy of the petition for rehearing filed by William C. McDuffie as Receiver of Richfield Oil Company of California, (hereinafter referred to as the Receiver). We thereupon dispatched another telegram to the Clerk of this Honorable Court informing him that we were filing a reply brief and protesting against this belated entrance of the Receiver into this case. This protest we now renew.

The Receiver's position herein is, we submit, anomalous. By reason of the machinations of the former officers of

the Richfield he holds 52% of the stock, a controlling interest, in Universal. He is on both sides of the fence. As Receiver he seeks to defeat a claim in which he owns a majority interest. He did not file a brief nor appear at the oral argument herein. Now, at the end of the time for filing a petition for rehearing, he appears with a 94 page document asking for a reconsideration of a matter which he has allowed to proceed to hearing, submission and the filing of an opinion. We cannot see after diligent examination that this weighty document contains a single new point, and we respectfully protest against the late intrusion into this case of one who should stand in a neutral position.

The Two Principal Points Presented by This Case.

At the outset we should probably point out that there were two main phases of this case discussed by this Honorable Court, (1) the application of the principle of *In re Oatway*, (1903) 2 Ch. D. 356, as adopted in the Federal Courts by the case of *Brennan v. Tillinghast,* 201 Fed. 609 (C. C. A. 6) (1913), and other Federal cases cited upon pages 4 and 5 of the opinion, and (2) the consideration of the evidence establishing the *prima facie* lowest intermediate balance. The petition of the Security Bank seeks a rehearing only upon this latter phase of the case. The wordy petition of the Receiver does, however, contain the complaint that the theory of *In re Oatway* is wrong. (Receiver's Petition p. 81 to 91, incl.)

The Application of In re Oatway.

We feel that the law is so clearly established upon this point and the matter so thoroughly considered by this Honorable Court that little mention need be made of the matter here. The Receiver claims that both the rule in *Hallett's* case and its logical extension in *In re Oatway* do not apply in the State of California when a trustee *ex maleficio* is involved. What confusion there is in the state law is a result of taking the so-called Hallett presumption literally and considering it as based upon the presumption that a person is innocent of crime or wrong. (Receiver's petition, page 68, *People v. Cal. Safe Deposit etc. Co.,* 175 Cal. 756 (1917)). This naturally has lead to the confusing result that when a trustee *ex maleficio* was involved the California Court thought it could not be presumed that he would act innocently with respect to the *cestui's* funds. In other words, certain of the California cases have overlooked the facts that have often been pointed out by the Federal Courts, namely that (a) the Hallett presumption is not to be used as a shield for a wrongdoer, and (b) that the *cestui* is entitled to what is left of the mixed fund or its product not because of any intent of the wrongdoer but because the wrongdoer, whatever his intent, should not be allowed to deprive the claimant of his lien on the mixed fund or its product. (See: 82 A. L. R. at page 160.)

This bit of reasoning in the California law is dignified by the Receiver by being called a rule of property and he urges it upon us as binding on the Federal Courts. In this connection we wish merely to again call the attention of this Honorable Court to the case of *Elmer v. Kemp,* 67 Fed. (2) 948, 952 (C. C. A. 9) (1933), cited on page 44 of our *Amicus Curiae* brief. There this Hon-

orable Court had before it the attempt of the Receiver of Guaranty Building and Loan Association to trace funds misappropriated by Gilbert Beesemyer into the assets of his insolvent *alter ego* The Elmer Company. This Honorable Court there directly considered whether it should be bound by state decisions to the point of not being able to express its own views of equitable jurisprudence and dismissed the contention in the following language:

> "Moreover, *in a federal court* of equity, *we must decide cases in accordance with our view of the general principles of equity jurisprudence.* Kuhn v. Fairmont Coal Co., 215 U. S. 349, 363, 30 S Ct. 140, 54 L. Ed. 228; Russell v. Southard, 12 How. 139, 13 L. Ed. 927; Neves v. Scott, 13 How. 268, 14 L. Ed. 140. *The decisions of the particular state in which the cause of action arose are to be followed only in so far as they conform to established principles of equitable jurisprudence."* (Italics ours.) (67 F. (2) at 952.)

See also cases cited on page 25 of the brief of Security Bank filed before the hearing.

The Proof of Universal's Prima Facie Case.

This brings us to a consideration of the second phase of this case, that is, the sufficiency of the evidence offered to establish the lowest intermediate balances of the Richfield bank account. Much is said in both petitions for rehearing about the burden of proof being always upon the claimant seeking to establish a trust and a number of cases containing such language have been cited.

We have at no time contended that this is not the rule. There is likewise no doubt, from the reading of the

opinion, that this Honorable Court recognizes it as the rule. We do contend, however, that in this case the evidence of the daily closing balances in the Richfield account when uncontradicted by any other competent evidence clearly satisfied this burden of proof. In every case, whether it be for the establishment of a trust lien, or any other cause of action, there comes a time when the party with the burden of proof either has, or has not, established his *prima facie* case. If the *prima facie* case is established, the duty then devolves upon the opposing party to introduce evidence controverting that showing. We believe that an analysis of both petitions for rehearing will show that their cases support no other proposition than the one just stated. This propostion is the basis for the opinion of this Honorable Court with respect to this phase of the case, and is the correct and unimpeachable rule as evidenced by the well reasoned decision of this Honorable Court in *American Surety Co. v. Jackson,* 24 Fed. (2) 768 (C. C. A. 9) (1928) where it was said by Circuit Judge Rudkin:

> "In *Smith v. Mottley, supra,* the Circuit Court of Appeals for the Sixth Circuit held that the burden of showing that his property had been wrongfully mingled in the mass of the property of the wrongdoer was on the owner who sought to follow it, but, when this was done, the burden shifted to the wrongdoer to show that the money or property had passed out of his hands, and that his trustee in bankruptcy stood in the same position. This ruling was reaffirmed in *Board of Com'rs. v. Strawn.*" (24 Fed. (2) at 770.)

Additional cases on this point are collected in 82 A. L. R. at page 205. The *American Surety* case and many of the others appearing in the A. L. R. note are cited in the opinion of this Honorable Court. It cannot possibly be conceived therefore why a further hearing should be granted upon a point already thoroughly discussed and considered.

We now pause to briefly examine the cases cited in the petitions to see if anything new is presented.

In the following cases appearing on pages 11-14, inclusive, of the Receiver's petition the *cestui que* trust clearly failed to establish a *prima facie* case.

Pottorff v. Key, 67 Fed. (2) 833 (C. C. A. 5) (1933) (Evidence traced trust res, not into the hands of the receiver, but *elsewhere.*) (67 Fed. (2) at 834);

Texas & Pac. Ry. Co. v. Pottorff, Receiver, 291 U. S. 245, 78 L. Ed. 777 (1934) (*Claimant failed to even establish a trust relation,* to say nothing of an identifiable res.) (78 L. Ed. at 786);

Slater v. Oriental Mills, 18 R. I. 352, 27 Atl. 443 (1893) (Even *on demurrer* it appeared here that the *cestui's* property had been *dissipated.*) (27 Atl. at 443);

Wisdom v. Keen, 69 Fed. (2) 349 (C. C. A. 5) (1934) (*No trust res ever existed.* "But no actual cash was segregated and specially deposited.") (69 Fed. (2) at 349.) ("Here the bank agreed to segregate a *trust res* but never did it.") (69 Fed. (2) at 350.)

Swan v. Children's Home Society of West Virginia, 67 F. (2) 84 (C. C. A. 4) (1933), Cert.

denied, 290 U. S. 704, 78 L. Ed. 605) "*It positively appears* that no fund which has come into the hands of the reciver could have been augmented as a result of the deposit here in question . . . the check to the bank resulted in a *mere shifting* of credits and added nothing whatever to its assets.") (67 Fed. (2) at 88).

Multnomah County v. Oregon Nat. Bank, 61 Fed. 912 (C. C. D. Ore.) (1894) ("*It does not appear* that the money for distribution includes any part of that belonging to the involuntary creditor. If this did appear, the lien of such creditor would attach, and he would have his preference.") (61 Fed. at 914).

In re Brunsing, Tolle & Postel, 169 Fed. 668; (D. C. Cal.) (1909) ("It will be observed that the referee does not find, specifically, that the bankrupt used $265.65 of Peterson's deposit to pay for merchandise which went into the general stock of merchandise carried by the bankrupt; nor is there any finding that such merchandise, or its proceeds, came into the hands of the trustee.") (169 Fed. at 668).

Lathrop v. Bampton, 31 Cal. 17 (1866) ("It is true the Court finds generally that he mixed the trust money with his own and used both in his general business expenditures and investments, but *the Court does not find, nor does the complaint allege,* that any of his estate now in the custody of the defendant is the fruit or product of those investments.") (31 Cal. at 22).

Merchants & Farmers Bank v. Austin, 48 Fed. 25; (C. C. N. D. Ala.) (1891) (". . . . but neither he nor any other witness says that

these checks were actually paid to the defendant bank. . . . But conceding that the money was collected and put into the general cash of the defendant bank, then what does the evidence show as to what became of it? . . . *There is no evidence* in the records *tracing any of the* complainant's *money or its proceeds into the hands of Receiver* Austin.") (48 Fed. at 27).

Lucas County v. Jamison, 170 Fed. 338; (C. C. S. D. Ia.) (1908) (*Funds completely dissipated.* "If the alleged trust funds have been dissipated then the cases are at an end; and with but one single exception such are the facts.") (170 Fed. at 348).

Stilson v. First State Bank, 149 Ia. 662; 129 N. W. 70 (1910) (Complainant merely established constructive trust based on fraud, *wholly failed* to maintain burden of proof) (129 N. W. at 72, 73).

The distinction drawn above between the cases cited on pages 10-14, inclusive, of the Receiver's petition and the principal case applies with equal force to the additional cases cited by the Receiver on pages 15 and 16 of his petition which he characterizes as being clearly at variance with the decision in the instant case. (Receiver's petition page 16.) Two of the following cases are also cited by the Security Bank on page 5 of its petition:

Schuyler v. Littlefield, 232 U. S. 707, 58 L. Ed. 806, (1914) (This case has been thoroughly considered by this Honorable Court and was discussed on pages 39 and 40 of our *Amicus Curiae* brief. This case was also cited by the Security Bank);

Texas & Pac. Ry. Co. v. Pottorff, Receiver, 291 U. S. 245, 78 L. Ed. 777 (1934) (Distinguished *supra*);

Titlow v. McCormick, 236 Fed. 209, (C. C. A. 9) (1916) (No augmentation) (236 Fed. at 211), (and where there was augmentation the funds were completely dissipated) (236 Fed. 212, 214);

In re J. M. Acheson Co., 170 Fed. 427 (C. C. A. 9) (1909) (This case is discussed on page 15 of our *Amicus Curiae* brief);

Poole v. Elliott, 76 Fed. (2) 772 (C. C. A. 4) (1935) ("Here there was neither allegation nor proof tracing the proceeds of the deposits by petitioner into the hands of the receivers;") (76 Fed. (2d) at 774);

In re A. D. Matthews' Sons, Inc., 238 Fed. 785 (C. C. A. 2) (1916) (Part of the funds sought to be impressed with a trust wholly dissipated, as to remainder merely a showing that the *trust res* was "somewhere" in the trustee's estate. Also cited on page 5 of the Security Bank petition) (238 Fed. at 786, 787);

Cook v. Elliott, 73 Fed. (2) 916 (C. C. A. 4) (1934) (Held merely that a trust relation was established. No evidence whatever re tracing and that question expressly left open) (73 Fed. (2) at 918);

Harmer v. Rendleman, 64 Fed. (2) 422 (C. C. A. 4) (1933) (No augmentation. ". . . plaintiff was not credited with the principal amount of any of the securities; . . . There is nothing to show what became of the securities." (64 Fed. (2) at 423).

First Nat. Bk. of St. Petersburg v. City of Miami, 69 Fed. (2) 346 (C. C. A. 5) (1934) (Clearly no augmentation, payment merely by check. "As proven, no sum whatever was collected and held for plaintiff. . . ." (69 Fed. (2) at 347) "Here, as there, there was 'but a shifting of liability.'" (69 Fed. (2) at 348).

Kershaw v. Jenkins, 71 Fed. (2) 647 (C. C. A. 10) (1934) "The check was charged to his account, but no new money was brought into the bank from an outside source. The transaction was merely one of shifting credits on the books of the bank, and that does not constitute augmentation of assets." (71 Fed. at 649).

In re Bogena & Williams, 76 Fed. (2) 950 (C. C. A. 7) (1935) (Here there was a complete failure of proof as to the condition of the bank account in question from February 11, 1933 to March 11, 1933.) (76 Fed. (2) at 954).

The Receiver's petition appears to reach the apex of its argument on this point when it states on page 29 thereof that the unanimous authority of five decisions passing directly on the point, two of them affirmed by the United States Supreme Court, are opposed to the decision rendered by this Honorable Court. These five decisions are cited on page 41 of the Receiver's petition. Two of said cases, also cited in the Security Bank's petition (p. 5), namely, *In re Brown,* 193 Fed. 24 (C. C. A. 2) (1912) affirmed without mention of this particular point in *First National Bank of Princeton v. Littlefield,* 226 U. S. 110 (1912) and *Schuyler v. Littlefield,* 232 U. S. 707, 58 L. Ed. 806 (1914) were thoroughly analyzed and distinguished from the case at bar in the brief *Amicus*

Curiae (pp. 24, 25, 39, 40) and have already been considered by this Honorable Court. Therefore, we shall not again burden the court with a discussion of those cases.

There remain, therefore, to be considered only three of the five decisions alleged to be directly at variance with the decision of this court.

The first case is *Marshburn v. Williams,* 15 Fed. (2) 589, (D. C. N. C.) (1926) cited on page 41 of Receiver's petition. We respectfully submit that that case is properly distinguished from the principal case upon the ground that there there was no augmentation of the assets passing into the hands of the Receiver. This distinction does not perhaps clearly appear from a mere reading of the opinion in the *Marshburn* case written by Circuit Judge Parker when sitting in the District Court. It does however clearly appear when Circuit Judge Parker while sitting in the Circuit Court of Appeals for the Fourth Circuit writes the opinion of *Schumaker v. Harriett,* 52 Fed. (2) 817 (1931) and says:

> "We have examined with care the cases relied upon by the receiver, particularly the cases of *First National Bank of Ventura v. Williams* (D. C.) 15 F. (2d) 585, and *Marshburn v. Williams* (D. C.) 15 F. (2d) 589; but we do not think that they are in point. In both of the cases cited the court was of the opinion that, *under the peculiar facts there existing,* there was no augmentation of the assets which passed into the hands of the receiver." (52 Fed. (2) at 820.)

The second new case cited by the Receiver is *Nixon State Bank v. First State Bank of Bridgeport,* 180 Ala. 291, 60 So. 868 (1912). The ruling in that case is ex-

plained by the fact that the Supreme Court of Alabama does not follow, and in fact, in the case of *Hanover Nat. Bank of N. Y. v. Thomas*, 217 Ala. 494, 117 So. 42 (1928) expressly repudiated, the doctrine established in *In re Hallett's* case and adopted by the Federal Courts in *Central National Bank v. Conn. Mutual Life Insurance Co.*, (104 U. S. 54, 26 L. Ed. 693):

> "The utterance immediately following the above quotation from the opinion in *J. Allen Smith & Co. v. Montgomery, as State Supt. of Banks, supra*, to-wit, 'and proof that he received or took over a fund into which the appellants' money had been placed or with which it had been commingled will not suffice,' *was intended to indicate that this court was not in accord with the doctrine announced in Re Hallett,* 13 Ch. Div. 696, that proof that the balance of the fund into which the claimant's money entered had not been reduced below the amount of the claim asserted would not meet the requirements of the law, but that the claimant must go further and show, as averred here, that the claimant's property remained in the fund into which it had been traced, and, thus commingled, passed into the hands of the respondent." (117 So. at 45.)

The third case cited by the Receiver not yet considered by this court is *Connolly v. Lang*, 68 Fed. (2) 119 (C. C. A. 7) (1933). It is patent from the following quotation therefrom that the evidence of the *cestui* there introduced failed to establish a *prima facie* case and was in no respect anywhere near as strong as the evidence introduced by Universal in the principal case:

> "While it is found that at the time the Bank was closed it had on hand more than the amount of ap-

> pellee's claim in cash, which appellant received, yet that does not necessarily mean that that sum included any part of appellee's money. *The cash balance of the Bank, if any, at the beginning of business on June 22, 1932, is not disclosed,* nor are the deposits and withdrawals shown for that day." (68 Fed. (2) at 201.) (Italics ours.)

There are two additional cases cited by the Receiver, one of which is also cited by the Security Bank, which we pause for a moment to consider. The first is *Borman v. Sullivan,* 77 Fed. (2) 342 (C. C. A. 7) (1935). By the Receiver's own admission the only language in the *Borman* case applicable to the principal case is mere dictum (Receiver's petition page 42). The case only holds that upon the facts proved no trust was created. However, even the dictum relied upon by the Receiver is not opposed to our contentions because, as is seen from the following quotation, it discloses that the evidence introduced by the *cestui* in order to trace the alleged trust funds was not nearly as clear as that introduced by Universal in the present case:

> "The record does not disclose the status of the bank's currency account at any time between the time at which it is claimed the bank received the money in trust and the time it closed." (77 Fed. (2) at 344.)

It is to be noted that the court in *Borman v. Sullivan, supra,* cited and relied upon only one case, namely, *St. Louis & S. F. R. R. v. Spiller,* 274 U. S. 304, 71 L. Ed. 1060 (1927) in support of its dictum. A careful reading and analysis of that case discloses that the funds upon which a trust was there sought to be imposed were

kept in *several banks* and had *in the aggregate* a balance in excess of the fund claimed by claimant. That is, although in the aggregate the several banks always contained an amount equal to the funds sought to be traced, no evidence whatever was introduced to show that as to *any one* of the several banks containing the deposits in question the funds in *that bank* had not at some time been wholly dissipated. The distinction which we have drawn between *St Louis & S. F. R. R. v. Spiller, supra,* and the present case is made conclusively by the case of *In re Bogana and Williams,* 76 Fed. (2) 950, in which case the Seventh Circuit Court of Appeals on pages 954 and 955 of its opinion expressly distinguishes the *Spiller* case upon the grounds we have suggested.

The remaining case to be considered is *Blumenfeld v. Union Nat. Bank,* 38 Fed. (2) 455 (C. C. A. 10) (1930) cited on page 5 of the petition for the Security Bank and pages 29 and 30 of the petition for the Receiver. We again submit that the evidence in that case is in nowise comparable to the evidence here introduced by Universal. This fact is self evident from the opinion of Circuit Judge Cotteral:

> "In the instant case there is a *dearth of evidence* to show what amount of money remained in the Beloit bank through the period dating from the time it acquired the trust fund on July 28, 1922, to the date the receiver took charge on November 5, 1923." (38 Fed. (2) at 457.)

It will thus be seen that the language of each of these cases must be considered directly with its own peculiar factual set-up. This is inevitably true when we deal with the sufficiency of the evidence to establish a *prima facie* case.

The new cases cited by the Receiver and by the Security Bank fail to in any way shake the opinion of this Honorable Court for reasons peculiar to themselves. There was either a failure to establish a trust; a failure to prove an augmentation of the assets or a failure to show the condition of the bank account for several days.

The Equities of This Case.

A good deal is said in both petitions about Universal and its minority stockholders being treated better than they deserve. The Security Bank hastens to say that if Universal were proceeding against Richfield alone they would have no complaint but that, "The bondholders . . . are as innocent of wrongdoing as is Universal itself." (Petition of the Security Bank, page 6). We have no doubt that this Honorable Court fully considered that matter, from a reading of the statements in its opinion (page 9) as to the relative equities. Before closing may we briefly, however, call the court's attention to page 204 of the transcript wherein the Special Master directly refutes the contention that the bondholders stand in a position equal with Universal concerning the properties subject to the trust lien:

> "*The trustee has not claimed any priority,* but counsel for Universal have discussed the possible point, and it should perhaps be noticed. *All of the payments in question out of trust funds were made after the date of the trust indenture.* The interests acquired by those payments could only be regarded as included in the indenture by virtue of a clause thereof extending the lien to after-acquired interests, *assuming the existence of such a clause.* It is true that a *bona fide* purchase or encumbrancer, for value,

> without notice, will be protected. (Citing cases.) But it appears to be established that an encumbrancer does not occupy that position in reference to after-acquired property, that his lien attaches in that case only to what the debtor actually acquires, and that if the latter gets nothing in fact, regardless of appearances, the former gets nothing. *Holt v. Henley,* 232 U. S. 637, 58 L. ed. 767; *Detroit Steel Cooperage Co. v. Sistersville Brewing Co.,* 232 U. S. 712, 58 L. ed. 1166; *Fosdick v. Schall,* 99 U. S. 235, 25 L. ed. 339." (Italics ours.)

It also seems to us that complaints as to the sufficiency of Universal's showing with respect to the condition of Richfield's bank account come from the mouth of the Security Bank with very poor grace. It should not be overlooked that Security Bank as trustee of the bond indenture also received the deposits of Richfield [Tr. p. 143] and maintained a system of bookkeeping which only showed the true status of an account at the end of the day. It, by its method of bookkeeping, controlled the evidence that could be introduced.

The Receiver in his belated appearance also feels that Universal has been unduly favored and characterizes himself as the representative of some 6,000 claimants among whom "are many whose claims are based on fraud equally as reprehensible as that in the case of Universal, if not more so." (Receiver's petition, pages 9 and 10.) The record is, of course, silent upon this point and these insubstantial defrauded claimants seem to be ghosts con-

jured up by the legerdemain of counsels' artful words. In fact, in the next breath counsel for the Receiver, again without support in the record, refer to the *United States v. Pan American Petroleum* case (55 Fed. (2d) 753) where recovery of oil stolen from the Naval Petroleum Reserve was sought. Counsel failed to point out that this has no bearing here particularly in view of the fact that that case has been settled and payments pursuant thereto are now being arranged. At any rate, two wrongs do not make a right nor does the righting of one necessarily mean that the other must go without remedy. If there are other defrauded creditors of Richfield they have had the same opportunity as Universal to present their evidence and obtain a lien upon property purchased with their funds.

The decision of this Honorable Court in *Harry E. Jones, Inc. v. Kemp,* 74 Fed. (2) 623 (C. C. A. 9) (1930), cited on page 24 of the Receiver's brief is certainly not contra to the thoughts expressed here. There the funds sought to be traced had been deposited in bank accounts and completely dissipated. It was urged that the Receiver was estopped to show this dissipation, and this Honorable Court naturally refused to take that view. The Receiver there certainly had the right to show by affirmative evidence that the funds had been dissipated and the Receiver here, or the Security Bank had the same right.

It is elementary that the Receiver by virtue of his representative capacity does not thereby lift himself to

rights greater than the defaulting trustee. As has been aptly said by the Special Master [Tr. p. 199]:

> "The character of proof is not changed by receivership. The receiver gets nothing more than his principal had; and he takes subject to all the equities. The marshalling of claims against the estate does not put into the estate what was not there."

And in *Fiman v. State of South Dakota,* 29 F. (2d) 776, 781 (C. C. A. 8) (1928) the court stated:

> "The receiver stands in the place of the bank, taking the assets in trust for the creditors, subject to the claims and defenses that might have been interposed against the insolvent corporation."

Conclusion.

The rights of the Receiver and the Security Bank were then to show by affirmative evidence that the *prima facie* case of Universal was in some way incorrect. This they failed to do. It seems useless to argue, particularly in this case, that the daily closing balance was not the one which truly disclosed the status of the bank account. This Honorable Court has aptly said upon page 9 of its opinion:

> "No citation of authority is necessary to support the statement that the daily closing balance is the one which reflects the actual state of the ordinary commercial bank account, and is the only one accepted and used by both bank and customer in ordinary business transactions."

In closing, the equities of Universal are clearly predominant and the evidence of the status of the bank account plain. If there was no evidence to controvert this *prima facie* showing it is now quite late for the Security Bank and the Receiver to complain that this matter should be reheard.

Respectfully submitted,

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